

Central Intelligence Agency



Washington, D.C. 20505

OCA 2019-88
16 JUN 1988

The Honorable James C. Miller, III
Director
Office of Management and Budget
Washington, D.C. 20503

Dear Mr. Miller:

This is in response to your request for our views on the enrolled bill H.R. 1212, the "Employee Polygraph Protection Act of 1986."

H.R. 1212 severely restricts private sector polygraph use. The sponsors have been careful, however, to make exception for national security uses of the polygraph. These include exceptions for agencies in the Intelligence Community (including the Central Intelligence Agency, the Defense Intelligence Agency, the National Security Agency and the Federal Bureau of Investigation) and for contractors of these agencies and their employees. We commend the Congress for these efforts and we are satisfied they adequately address the equities of the Intelligence Community.

We remain somewhat concerned, however, that the negative atmosphere created by this legislation could impede our future ability to use the polygraph or to recruit and retain competent polygraph personnel. We also do not wish this to become the first step in an assault on our use of the polygraph or in an effort to apply to that use restrictions appropriate only to the private sector.

On balance, as the bill makes specific provision for our interests, we would have no objection to a Presidential approval. We did want to use this opportunity, however, to express our more general concerns about legislation in this area.

Thank you for the opportunity to comment on this important piece of legislation.

Sincerely,

[Signature Box]

John L. Helgerson
Director of Congressional Affairs

STAT

SUBJECT: Letter to Mr. Miller (OMB) regarding H.R. 1212

OCA/LEG/ [] (14 June 1988)

STAT

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STAT



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503
ENROLLED BILL REQUEST

June 10, 1988

TO: LEGISLATIVE LIAISON OFFICER:

Dept of Treasury - Carole Toth - 566-8523
Dept of Defense - Samuel Brick, Jr. - 697-1305
Dept of Commerce- Joyce Smith - 377-4264
Dept of Energy- Bob Rabben - 586-6718
Dept of Labor - Nancy Currier - 523-8207
Dept of State - Bronwyn Bochrach - 647-4463
Dept of Transportation- Nancy Duykers - 366-4684
NASA- Toby Costanzo - 453-1941
CIA - John Halgerson -
National Security Council- Paul Stevens - 456-6534

STAT

SUBJECT: ENROLLED BILL - HR 1212 "Employee Polygraph Protection Act of 1988"

In accordance with OMB Circular No. A-19, your written views and recommendation for Presidential action are requested on HR 1212 as enrolled. The text of the Conference Report (H.Rept. 100-659) is printed 5/26/88 Congressional Record, pages H3706-3710.

Please consult section 10 of OMB Circular No. A-19, pages 12-14, for instructions regarding the preparation of enrolled bill letters and the procedures to be followed on enrolled bills.

Within **TWO DAYS** (including holidays but excluding Sundays) after receipt of this request, your reply (original and one copy) should be delivered VIA SPECIAL MESSENGER to Mrs. Julia Yuille, Room 7201, New Executive Office Building. (In addition, you may wish to send in advance a copy of your views letter using telecopier equipment.)

Your cooperation in meeting this deadline is needed to provide maximum time for Presidential action on the enrolled bill.

A regular facsimile of the enrolled bill will be sent to you through the regular messenger service when available. The legislative attorney handling this bill is Branden Blum (395-3454)

JAMES C. MURR
Acting Assistant Director
for Legislative Reference

H 8706

CONGRESSIONAL RECORD — HOUSE

May 26, 1968

Karich	Nelson	Smith, Denny
Kemp	Olson	(OR)
Kolbe	Parks	Smith, Robert
Kyl	Pashayan	(NH)
LaFalce	Patterson	Smith, Robert
Latta	Petri	(OR)
Lehman (FL)	Porter	Snowe
Lent	Pursell	Solomon
Lewis (FL)	Ravenel	Stangeland
Lightfoot	Regula	Stenholm
Livingston	Rhodes	Studds
Lloyd	Ridge	Stump
Lott	Ritter	Sundquist
Lowery (CA)	Roberts	Sweeney
Lukens, Donald	Rogers	Swindall
Lungren	Roth	Tallon
Madigan	Rowland (CT)	Tauke
Marlenee	Raybal	Tauzin
Martin (IL)	Saxton	Taylor
McCandless	Schaefer	Upton
McCrery	Schneider	Vander Jagt
McEwen	Schuette	Vandlosky
McGrath	Schulze	Vucanovich
McHugh	Sensenbrenner	Walker
McMillan (NY)	Sharp	Watkins
Meyers	Shaw	Weber
Micheli	Shays	Weldon
Miller (OH)	Shumway	Whittaker
Miller (WA)	Shuster	Whitten
Molinari	Skeen	Wylie
Moorhead	Slaughter (NY)	Yates
Morrison (WA)	Slaughter (VA)	Yatron
Murphy	Smith (IA)	Young (FL)
Myers	Smith (NE)	
Nagle	Smith (TX)	

NOT VOTING—49

Aspin	Garcia	Mica
Blaggi	Gray (IL)	Moakley
Boland	Hansen	Mrazek
Boulter	Hatcher	Nichols
Brown (CA)	Hiller	Oaker
Bryant	Hutto	Oxley
Bustamante	Jenkins	Quillen
Chapman	Jones (TN)	Rose
Coleman (TX)	Konnyu	Roukema
Craig	Lancaster	Spence
Dellums	Leach (IA)	St Germain
Dicks	Lewis (CA)	Weiss
Duncan	Lujan	Wilson
Dwyer	Mack	Wolpe
Espy	MacKay	Wortley
Florio	Martin (NY)	
Gallo	McCollum	

□ 1607

The Clerk announced the following pairs:

On this vote:

Mr. Mica for, with Mr. Craig against.
Mr. Oxley for, with Mr. Boulter against.
Mrs. Roukema for, with Mr. Hansen against.
Mr. Konnyu for, with Mr. Quillen against.
Mr. Dellums for, with Mr. Leach of Iowa against.
Mr. Chapman for, with Mr. McCollum against.

Mr. BATES, Mrs. BOGGS, and Messrs. NAGLE, GLICKMAN, and HUGHES changed their votes from "yea" to "nay."

Mr. VOLKMER, Mrs. BENTLEY, Mr. BILIRAKIS, and Mr. SCHEUER changed their votes from "nay" to "yea."

So the conference report was agreed to.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. GRAY of Pennsylvania. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks, and to include extrane-

ous material on the conference report on House Concurrent Resolution 383.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Pennsylvania?

There was no objection.

FURTHER MESSAGE FROM THE SENATE

A further message from the Senate by Mr. Halker, one of its clerks, announced that the Senate had passed with amendments in which the concurrence of the House is requested, bills of the House of the following titles:

H.R. 4445. An act to amend title 18, United States Code, to prohibit certain firearms especially useful to terrorists; and

H.R. 4448. An act to designate the Cleveland Ohio General Mail Facility and Main Office in Cleveland, OH, as the "John O. Helly Building of the United States Postal Service."

The message also announced that the Senate had passed bills of the following titles, in which the concurrence of the House is requested:

S. 425. An act for the relief of Sukhjit Kuldip Singh Sandu;

S. 583. An act for the relief of Maria Antonietta Heird;

S. 1842. An act for the relief of Mr. Wilhelm Jahn Schlechter, Mrs. Monica Pino Schlechter, Ingrid Daniela Schlechter, and Arturo David Schlechter; and

S. 1972. An act for the relief of Irma Purisch and Daniel Purisch.

CONFERENCE REPORT ON H.R. 1212, EMPLOYEE POLYGRAPH PROTECTION ACT OF 1968

Mr. WILLIAMS submitted the following conference report and statement on the bill (H.R. 1212) to prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce:

CONFERENCE REPORT (H. REPT. 100-659)

The committee of conference on the disagreeing votes of the two Houses on the amendment of the Senate to the bill (H.R. 1212) to prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce, having met, after full and free conference, have agreed to recommend and do recommend to their respective Houses as follows:

That the House recede from its disagreement to the amendment of the Senate to the text of the bill and agree to the same with an amendment as follows:

In lieu of the matter proposed to be inserted by the Senate amendment, insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Employee Polygraph Protection Act of 1968".

SEC. 2. DEFINITIONS.

As used in this Act:

(1) **COMMERCE.**—The term "commerce" has the meaning provided by section 3(b) of the Fair Labor Standards Act of 1938 (29 U.S.C. 203(b)).

(2) **EMPLOYER.**—The term "employer" includes any person acting directly or indirectly in the interest of an employer in rela-

tion to an employee or prospective employee.

(3) **LIE DETECTOR.**—The term "lie detector" includes a polygraph, electrograph, voice stress analyzer, psychological stress indicator, or any other similar device (whether mechanical or electrical) that is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(4) **POLYGRAPH.**—The term "polygraph" means an instrument that—

(A) records continuously, visually, permanently, and simultaneously changes in cardiovascular, respiratory, and electrodermal patterns as minimum instrumentation standards; and

(B) is used, or the results of which are used, for the purpose of rendering a diagnostic opinion regarding the honesty or dishonesty of an individual.

(5) **SECRETARY.**—The term "Secretary" means the Secretary of Labor.

SEC. 3. PROHIBITIONS ON LIE DETECTOR USE.

Except as provided in sections 7 and 8, it shall be unlawful for any employer engaged in or affecting commerce or in the production of goods for commerce—

(1) directly or indirectly, to require, request, suggest, or cause any employee or prospective employee to take or submit to any lie detector test;

(2) to use, except, refer to, or inquire concerning the results of any lie detector test of any employee or prospective employee;

(3) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against—

(A) any employee or prospective employee who refuses, declines, or fails to take or submit to any lie detector test; or

(B) any employee or prospective employee on the basis of the results of any lie detector test; or

(4) to discharge, discipline, discriminate against in any manner, or deny employment or promotion to, or threaten to take any such action against, any employee or prospective employee because—

(A) such employee or prospective employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act;

(B) such employee or prospective employee has testified or is about to testify in any such proceeding; or

(C) of the exercise by such employee or prospective employee, on behalf of such employee or another person, of any right afforded by this Act.

SEC. 4. NOTICE OF PROTECTION.

The Secretary shall prepare, have printed, and distribute a notice setting forth excerpts from, or summaries of, the pertinent provisions of this Act. Each employer shall post and maintain such notice in conspicuous places on its premises where notices to employees and applicants to employment are customarily posted.

SEC. 5. AUTHORITY OF THE SECRETARY.

(a) **IN GENERAL.**—The Secretary shall—

(1) issue such rules and regulations as may be necessary or appropriate to carry out this Act;

(2) cooperate with regional, State, local, and other agencies, and cooperate with and furnish technical assistance to employers, labor organizations, and employment agencies to aid in effectuating the purposes of this Act; and

(3) make investigations and inspections and require the keeping of records necessary or appropriate for the administration of this Act.

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(b) **SUBPOENA AUTHORITY.**—For the purpose of any hearing or investigation under this Act, the Secretary shall have the authority contained in sections 9 and 10 of the Federal Trade Commission Act (15 U.S.C. 49 and 50).

SEC. 6. ENFORCEMENT PROVISIONS.**(a) CIVIL PENALTIES.**

(1) **IN GENERAL.**—Subject to paragraph (2), any employer who violates any provision of this Act may be assessed a civil penalty of not more than \$10,000.

(2) **DETERMINATION OF AMOUNT.**—In determining the amount of any penalty under paragraph (1), the Secretary shall take into account the previous record of the person in terms of compliance with this Act and the gravity of the violation.

(3) **COLLECTION.**—Any civil penalty assessed under this subsection shall be collected in the same manner as is required by subsections (b) through (e) of section 503 of the Migrant and Seasonal Agricultural Worker Protection Act (29 U.S.C. 1853) with respect to civil penalties assessed under subsection (a) of such section.

(4) **INJUNCTIVE ACTIONS BY THE SECRETARY.**—The Secretary may bring an action under this section to restrain violations of this Act. The Solicitor of Labor may appear for and represent the Secretary in any litigation brought under this Act. In any action brought under this section, the district courts of the United States shall have jurisdiction, for cause shown, to issue temporary or permanent restraining orders and injunctions to require compliance with this Act, including such legal or equitable relief incident thereto as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(c) PRIVATE CIVIL ACTIONS.

(1) **LIABILITY.**—An employer who violates this Act shall be liable to the employee or prospective employee affected by such violation. Such employer shall be liable for such legal or equitable relief as may be appropriate, including, but not limited to, employment, reinstatement, promotion, and the payment of lost wages and benefits.

(2) **COURT.**—An action to recover the liability prescribed in paragraph (1) may be maintained against the employer in any Federal or State court of competent jurisdiction by an employee or prospective employee for or on behalf of such employee, prospective employee, and other employees or prospective employees similarly situated. No such action may be commenced more than 3 years after the date of the alleged violation.

(3) **COSTS.**—The court, in its discretion, may allow the prevailing party (other than the United States) reasonable costs, including attorney's fees.

(4) **WAIVER OF RIGHTS PROHIBITED.**—The rights and procedures provided by this Act may not be waived by contract or otherwise, unless such waiver is part of a written settlement agreed to and signed by the parties to the pending action or complaint under this Act.

SEC. 7. EXEMPTIONS.

(a) **NO APPLICATION TO GOVERNMENTAL EMPLOYERS.**—This Act shall not apply with respect to the United States Government, any State or local government, or any political subdivision of a State or local government.

(b) **NATIONAL DEFENSE AND SECURITY EXEMPTION.**

(1) **NATIONAL DEFENSE.**—Nothing in this Act shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to—

(A) any expert or consultant under contract to the Department of Defense or any

employee of any contractor of such Department or

(B) any expert or consultant under contract with the Department of Energy in connection with the atomic energy defense activities of such Department or any employee of any contractor of such Department in connection with such activities.

(2) **SECURITY.**—Nothing in this Act shall be construed to prohibit the administration, by the Federal Government, in the performance of any intelligence or counterintelligence function, of any lie detector test to—

(A)(i) any individual employed by, assigned to, or detailed to, the National Security Agency, the Defense Intelligence Agency, or the Central Intelligence Agency,

(ii) any expert or consultant under contract to any such agency,

(iii) any employee of a contractor to any such agency,

(iv) any individual applying for a position in any such agency, or

(v) any individual assigned to a space where sensitive cryptologic information is produced, processed, or stored for any such agency; or

(B) any expert, or consultant (or employee of such expert or consultant) under contract with any Federal Government department, agency, or program whose duties involve access to information that has been classified at the level of top secret or designated as being within a special access program under section 4.2(a) of Executive Order 12356 (or a successor Executive order).

(c) **FBI CONTRACTORS EXEMPTION.**—Nothing in this Act shall be construed to prohibit the administration, by the Federal Government, in the performance of any counterintelligence function, of any lie detector test to an employee of a contractor of the Federal Bureau of Investigation of the Department of Justice who is engaged in the performance of any work under the contract with such Bureau.

(d) **LIMITED EXEMPTION FOR ONGOING INVESTIGATIONS.**—Subject to sections 8 and 10, this Act shall not prohibit an employer from requesting an employee to submit to a polygraph test if—

(1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business, such as theft, embezzlement, misappropriation, or an act of unlawful industrial espionage or sabotage;

(2) the employee had access to the property that is the subject of the investigation;

(3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation; and

(4) the employer executes a statement, provided to the examinee before the test, that—

(A) sets forth with particularity the specific incident or activity being investigated and the basis for testing particular employees,

(B) is signed by a person (other than a polygraph examiner) authorized to legally bind the employer,

(C) is retained by the employer for at least 3 years, and

(D) contains at a minimum—

(i) an identification of the specific economic loss or injury to the business of the employer,

(ii) a statement indicating that the employee had access to the property that is the subject of the investigation, and

(iii) a statement describing the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity under investigation.

(e) **EXEMPTION FOR SECURITY SERVICES.**

(1) **IN GENERAL.**—Subject to paragraph (2) and sections 8 and 10, this Act shall not pro-

hibit the use of polygraph tests on prospective employees by any private employer whose primary business purpose consists of providing armored car personnel, personnel engaged in the design, installation, and maintenance of security alarm systems, or other uniformed or plainclothes security personnel and whose function includes protection of—

(A) facilities, materials, or operations having a significant impact on the health or safety of any State or political subdivision thereof, or the national security of the United States, as determined under rules and regulations issued by the Secretary within 90 days after the date of the enactment of this Act, including—

(i) facilities engaged in the production, transmission, or distribution of electric or nuclear power,

(ii) public water supply facilities,

(iii) shipments or storage of radioactive or other toxic waste materials, and

(iv) public transportation, or

(B) currency, negotiable securities, precious commodities or instruments, or proprietary information.

(2) **ACCESS.**—The exemption provided under this subsection shall not apply if the test is administered to a prospective employee who would not be employed to protect facilities, materials, operations, or assets referred to in paragraph (1).

(f) **EXEMPTION FOR DRUG SECURITY, DRUG THEFT, OR DRUG DIVERSION INVESTIGATIONS.**

(1) **IN GENERAL.**—Subject to paragraph (2) and sections 8 and 10, this Act shall not prohibit the use of a polygraph test by any employer authorized to manufacture, distribute, or dispense a controlled substance listed in schedule I, II, III, or IV of section 202 of the Controlled Substances Act (21 U.S.C. 812).

(2) **ACCESS.**—The exemption provided under this subsection shall apply—

(A) if the test is administered to a prospective employee who would have direct access to the manufacture, storage, distribution, or sale of any such controlled substance; or

(B) in the case of a test administered to a current employee, if—

(i) the test is administered in connection with an ongoing investigation of criminal or other misconduct involving, or potentially involving, loss or injury to the manufacture, distribution, or dispensing of any such controlled substance by such employer, and

(ii) the employee had access to the person or property that is the subject of the investigation.

SEC. 8. RESTRICTIONS ON USE OF EXEMPTIONS.

(a) **TEST AS BASIS FOR ADVERSE EMPLOYMENT ACTION.**

(1) **UNDER ONGOING INVESTIGATIONS EXEMPTION.**—Except as provided in paragraph (2), the exemption under subsection (d) of section 7 shall not apply if an employee is discharged, disciplined, denied employment or promotion, or otherwise discriminated against in any manner on the basis of the analysis of a polygraph test chart or the refusal to take a polygraph test, without additional supporting evidence. The evidence required by such subsection may serve as additional supporting evidence.

(2) **UNDER OTHER EXEMPTIONS.**—In the case of an exemption described in subsection (e) or (f) of such section, the exemption shall not apply if the results of an analysis of a polygraph test chart are used, or the refusal to take a polygraph test is used, as the sole basis upon which an adverse employment action described in paragraph (1) is taken against an employee or prospective employee.

(b) **RIGHTS OF EXAMINEE.**—The exemptions provided under subsections (d), (e), and (f)

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of section 7 shall not apply unless the requirements described in the following paragraphs are met:

(1) **ALL PHASES.**—Throughout all phases of the test—

(A) the examinee shall be permitted to terminate the test at any time;

(B) the examinee is not asked questions in a manner designed to degrade, or needlessly intrude on, such examinee;

(C) the examinee is not asked any question concerning—

(i) religious beliefs or affiliations,
(ii) beliefs or opinions regarding racial matters,

(iii) political beliefs or affiliations,
(iv) any matter relating to sexual behavior; and

(v) beliefs, affiliations, opinions, or lawful activities regarding unions or labor organizations; and

(D) the examiner does not conduct the test if there is sufficient written evidence by a physician that the examinee is suffering from a medical or psychological condition or undergoing treatment that might cause abnormal responses during the actual testing phase.

(2) **PRETEST PHASE.**—During the pretest phase, the prospective examinee—

(A) is provided with reasonable written notice of the date, time, and location of the test, and of such examinee's right to obtain and consult with legal counsel or an employee representative before each phase of the test;

(B) is informed in writing of the nature and characteristics of the tests and of the instruments involved;

(C) is informed, in writing—

(i) whether the testing area contains a two-way mirror, a camera, or any other device through which the test can be observed,

(ii) whether any other device, including any device for recording or monitoring the test, will be used, or

(iii) that the employer or the examinee may (with mutual knowledge) make a recording of the test;

(D) is read and signs a written notice informing such examinee—

(i) that the examinee cannot be required to take the test as a condition of employment,

(ii) that any statement made during the test may constitute additional supporting evidence for the purposes of an adverse employment action described in subsection (a),

(iii) of the limitations imposed under this section,

(iv) of the legal rights and remedies available to the examinee if the polygraph test is not conducted in accordance with this Act, and

(v) of the legal rights and remedies of the employer under this Act (including the rights of the employer under section 9(c)(2)); and

(E) is provided an opportunity to review all questions to be asked during the test and is informed of the right to terminate the test at any time.

(3) **ACTUAL TESTING PHASE.**—During the actual testing phase, the examiner does not ask such examinee any question relevant during the test that was not presented in writing for review to such examinee before the test.

(4) **POST-TEST PHASE.**—Before any adverse employment action, the employer shall—

(A) further interview the examinee on the basis of the results of the test; and

(B) provide the examinee with—

(i) a written copy of any opinion or conclusion rendered as a result of the test, and

(ii) a copy of the questions asked during the test along with the corresponding charted responses.

(5) **MAXIMUM NUMBER AND MINIMUM DURATION OF TESTS.**—The examiner shall not conduct and complete more than five polygraph tests on a calendar day on which the test is given, and shall not conduct any such test for less than a 90-minute duration.

(c) **QUALIFICATIONS AND REQUIREMENTS OF EXAMINERS.**—The exemptions provided under subsections (d), (e), and (f) of section 7 shall not apply unless the individual who conducts the polygraph test satisfies the requirements under the following paragraphs:

(1) **QUALIFICATIONS.**—The examiner—

(A) has a valid and current license granted by licensing and regulatory authorities in the State in which the test is to be conducted, if so required by the State; and

(B) maintains a minimum of a \$50,000 bond or an equivalent amount of professional liability coverage.

(2) **REQUIREMENTS.**—The examiner—

(A) renders any opinion or conclusion regarding the test—

(i) in writing and solely on the basis of an analysis of polygraph test charts,

(ii) that does not contain information other than admissions, information, case facts, and interpretation of the charts relevant to the purpose and stated objectives of the test, and

(iii) that does not include any recommendation concerning the employment of the examinee; and

(B) maintains all opinions, reports, charts, written questions, lists, and other records relating to the test for a minimum period of 3 years after administration of the test.

SEC. 2. DISCLOSURE OF INFORMATION.

(a) **IN GENERAL.**—A person, other than the examinee, may not disclose information obtained during a polygraph test, except as provided in this section.

(b) **PERMITTED DISCLOSURES.**—A polygraph examiner may disclose information acquired from a polygraph test only to—

(1) the examinee or any other person specifically designated in writing by the examinee;

(2) the employer that requested the test; or

(3) any court, governmental agency, arbitrator, or mediator, in accordance with due process of law, pursuant to an order from a court of competent jurisdiction.

(c) **DISCLOSURE BY EMPLOYER.**—An employer (other than an employer described in subsection (a), (b), or (c) of section 7) for whom a polygraph test is conducted may disclose information from the test only to—

(1) a person in accordance with subsection (b); or

(2) a governmental agency, but only insofar as the disclosed information is an admission of criminal conduct.

SEC. 3. EFFECT ON OTHER LAW AND AGREEMENTS.

Except as provided in subsections (a), (b), and (c) of section 7, this Act shall not preempt any provision of any State or local law or of any negotiated collective bargaining agreement that prohibits lie detector tests or is more restrictive with respect to lie detector tests than any provision of this Act.

SEC. 11. EFFECTIVE DATE.

(a) **IN GENERAL.**—Except as provided in subsection (b), this Act shall become effective 6 months after the date of enactment of this Act.

(b) **REGULATIONS.**—Not later than 90 days after the date of enactment of this Act, the Secretary shall issue such rules and regulations as may be necessary or appropriate to carry out this Act.

And the Senate agree to the same.

AUGUSTUS F. HAWKINS,
MATTHEW G. MARTINEZ,
PAT WILLIAMS,

JIM JEFFORDS,
STEVE GUNDERSON,
Managers on the Part of the House.

EDWARD M. KENNEDY,
HOWARD M. METZENBAUM,
SPARK MATSUMAGA,
ORRIN HATCH,
ROBERT T. STAFFORD,

Managers on the Part of the Senate.

JOINT EXPLANATORY STATEMENT OF THE COMMITTEE OF CONFERENCE

The managers on the part of the House and the Senate at the conference on the disagreeing votes of the two Houses on the amendment of the Senate, to the bill (H.R. 1212) to prevent the denial of employment opportunities by prohibiting the use of lie detectors by employers involved in or affecting interstate commerce, submit the following joint statement to the House and the Senate in explanation of the effect of the action agreed upon by the managers and recommended in the accompanying conference report:

The Senate amendment struck out all of the House bill after the enacting clause and inserted a substitute text.

The House recedes from its disagreement to the amendment of the Senate with an amendment which is a substitute for the House bill and the Senate amendment. The differences between the House bill, the Senate amendment, and the substitute agreed to in conference are noted below, except for clerical corrections, conforming changes made necessary by agreements reached by the conferees, and minor drafting and clarifying changes.

DEFINITIONS

The House bill defines the terms "lie detector test," "employer," and "commerce."

The Senate bill defines these terms and others.

The conference agreement contains definitions that are generally self-explanatory. However, two points of clarification should be made with respect to the definition of "lie detector" adopted by the conference. First, unlike the House bill and Senate amendment, the conference agreement defines not a lie detector test but the device itself. The conferees did so to provide greater clarity to the definition, and intend that the prohibition on a lie detector test be construed broadly to include any use of a lie detector. Second, the conference agreement parallels the House definition of lie detector to prohibit the use of all such devices, whether mechanical or electrical. By declining to include chemical testing, the conferees intend that the term "lie detector" does not include medical tests used to determine the presence or absence of controlled substances or alcohol in bodily fluids. The conferees also do not intend to include written or oral tests (commonly referred to as "honesty" or "paper and pencil" tests) within the definition of lie detector.

In distinguishing between the lie detector and the polygraph, it is the intent of the conferees to prohibit private employers from using the deceptionograph, voice stress analyzer, psychological stress evaluator or any other similar device (whether mechanical or electrical) while permitting only the use of the polygraph for those purposes under the special circumstances defined in the Act.

PROHIBITIONS ON LIE DETECTOR USE

The House bill generally prohibits the use of all types of lie detectors in private employment settings. Federal, state and local government employers are exempt from this prohibition, as are private contractors engaged in intelligence or counterintelligence

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work. Employers providing private security services, and employers involved in the manufacture, distribution and dispensing of controlled substances, may also request polygraph tests under certain circumstances.

The Senate amendment contains a similar prohibition against lie detector tests. It provides almost identical exemptions for governmental and national security usage, as well as for employers providing private security services. It also exempts employees or any prospective employee of a nuclear power plant. Moreover, the Senate amendment provides that all employers may request a polygraph test in connection with an ongoing investigation of a specific incident or activity involving economic loss or injury.

The conference agreement retains the exemptions for federal, state and local governments. The exemption provided for national security functions specifies that the federal government may administer lie detector tests to certain employees of contractors to various federal agencies engaged in intelligence and counterintelligence work. The conference agreement is designed to conform with the National Defense Authorization Act for Fiscal Years 1988 and 1989 (H.R. 1748), which restricts such testing to individuals whose duties involve access to top secret or special access program information.

By exempting public sector employers and private contractors engaged in intelligence and counterintelligence functions, the conferees recognize the functions performed by these employers are not within the jurisdiction of the committees which reported the legislation, and the policy decisions as to the proper or improper use of such tests are left to the committees of jurisdiction and expertise.

The conference agreement provides a limited exemption from the general prohibition on lie detectors for the use of polygraphs in connection with an on going investigation involving economic loss or injury to the employer's business. An employer may request such a test of an employee only when the employee had access to the property and the employer has a reasonable suspicion that the employee was involved in the incident.

The conference agreement slightly alters the description of economic loss to clarify that the examples cited are illustrative and not exhaustive. The conferees do not intend that all losses, such as an unintentional economic loss stemming from a truck or workplace accident, should serve as a pretext for the administration of a polygraph test. Similarly, the economic loss incident to lawful union or employee activity would not satisfy this standard. There are also specific incidents, such as check-kiting, money laundering, or the misappropriation of inside or confidential information which would meet the requisite injury standard even though they might result in short term gain. Similarly, such instances as theft from property managed by an employer would meet the required injury standard.

Prior to requesting a polygraph test, an employer must execute a statement setting forth with particularity the specific incident or activity being investigated and the basis for testing a particular employee. The statement must be signed by a person authorized by law to bind the employer and must be retained by the employer for three years. At a minimum, the statement must identify the specific loss or injury to the employer, must describe the employee's access, and must explain the basis of the employer's reasonable suspicion that the employee was involved in the incident or activity. This statement must be provided to an employee prior to the administration of a test.

The conferees intend that the term "reasonable suspicion" refers to some observable, articulable basis in fact beyond the predicate loss and access required for any testing. This could include such factors as the demeanor of the employee or discrepancies which arise during the course of an investigation. And while access alone does not constitute a basis for reasonable suspicion, the totality of circumstances surrounding such access, such as its unauthorized or unusual nature, may constitute an additional factor.

The conference agreement provides for two additional exceptions from the general prohibition on lie detector tests. Employers engaged in providing certain private security services, and employers engaged in manufacturing, distributing or dispensing controlled substances, are not prohibited from using polygraphs for employees or prospective employees if such tests are conducted in accordance with certain restrictions.

The conferees did not adopt the exemption for employees of a nuclear power facility. Under current law (P.L. 99-399), these employers are already required to fingerprint all unescorted personnel in such facilities. These fingerprints must be submitted to the Attorney General of the United States through the Nuclear Regulatory Commission for identification and a criminal history records check. The conferees believe that these extensive and unusual requirements are much more likely to provide accurate, verifiable information about an applicant than could be obtained from a lie detector test.

NOTICE OF PROTECTION

The House bill requires the Secretary of Labor to prepare and distribute a notice regarding the Act. Employers must post and maintain such notice in a conspicuous place.

The Senate amendment is similar.

The conference agreement adopts the language of the Senate amendment. The conferees recognize that it is not possible for the Secretary to distribute a notice by mail to each affected employer, but expect that such notices will be made available and the Secretary will take appropriate steps to advise employers of their obligations.

ENFORCEMENT PROVISIONS

The House bill provides for a penalty for failure to post notices, civil penalties of not more than \$10,000 for other violations, authority for injunctive actions by the Secretary, and authority for private civil actions.

The Senate amendment does not provide a separate penalty for failure to post notices, but is similar to the House bill in other respects.

The conference agreement does not include a separate penalty for failure to post notices. It does permit the assessment by the Secretary of Labor of a civil penalty of not more than \$10,000 for any violation of the Act. The Secretary is also permitted to bring an action for injunctive relief or other legal or equitable relief incident thereto. The Solicitor of Labor is authorized to appear on behalf of the Secretary in such proceedings. An employee or prospective employee may bring an action as well, provided it is commenced within three years of the date of the alleged violation. The rights and procedures afforded under the Act may not be waived unless such waiver is part of a written settlement agreed to and signed by each of the parties to the pending action or complaint.

The conferees intend that the enforcement provisions are not to be construed as a limitation upon private actions being brought under current law. Nothing in the Act is intended to limit the courts in granting any and all remedies currently available.

RESTRICTIONS ON POLYGRAPH USAGE

The House bill stipulates that the results of lie detector tests may not be used as the sole basis for an adverse employment action when used in the private security or pharmaceutical industries.

The Senate amendment prohibits adverse employment action based on the results of a polygraph test, or the refusal to take a polygraph test, whether in connection with an ongoing investigation or within the private security industry, without additional supporting evidence. The Senate amendment also requires that an examiner must provide information regarding the details of the test and the examinee's rights. Finally, the Senate amendment establishes minimum standards for polygraph examiners.

The conference agreement provides that the refusal to take a polygraph test, or the results of a polygraph test generally may not serve as the basis for an adverse employment action without additional supporting evidence. Evidence leading to the employer's reasonable suspicion may constitute such additional supporting evidence. In the case of the pharmaceutical and private security industries, the refusal to take a polygraph test or the results of a polygraph test may not serve as the sole basis upon which an adverse employment action is taken against an employee or prospective employee.

The conference agreement provides that prior to the test an examinee must be read and provided in writing a notice including each of the examinee's rights and the limitations imposed, such as prohibited areas of questioning and restrictions on the use of test results. The conferees intend that this notice may clear to examinees that admissions of criminal conduct made by the examinee may be transmitted to any appropriate governmental agency.

The conference agreement makes clear that, among other rights an examinee may refuse to take a test, terminate a test at any time, or decline to take a test if subject to a medical condition that might cause an abnormal response. The conferees intend that an individual who exercises any of these rights be treated the same as one who refused to take a test, with the protections incident thereto. The conference agreement also makes clear that an examinee must be informed of the actions an employer may take if the examinee exercises these rights, including taking an adverse employment action provided that the other requirements of the Act have been satisfied.

The conference agreement establishes no licensing standards for polygraph examiners except that they must have a valid and current license if required by the state in which a test is to be conducted; they must maintain a \$50,000 bond or equivalent amount of professional liability coverage; and they must meet certain requirements regarding the nature, form and retention of opinions and other records related to the test.

DISCLOSURE OF INFORMATION

The House bill contains no provision relating to the disclosure of information obtained during a polygraph test.

The Senate amendment restricts the ability of examiners and employers to disclose such information.

The conference agreement prohibits examiners and employers from disclosing information obtained during a polygraph test other than to a person designated by the examinee, the person who requested the test, or certain other persons pursuant to a court order. The conference agreement also permits the disclosure of an admission of criminal conduct made by the examinee to any appropriate governmental agency. However,

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the employer may not transmit any other information, including opinions, charts, or other records relating to the examination, unless such governmental agency complies with all other provisions of the Act to obtain such information.

EFFECT ON OTHER LAWS AND AGREEMENTS

The House bill provides that its provisions will not preempt more restrictive provisions found in state or local laws or negotiated agreements.

The Senate bill contains similar provisions.

The conference agreement provides that its provisions will not preempt any provision of state or local law, or any provision of a collective bargaining agreement, that prohibits lie detector tests or is more restrictive with respect to lie detector tests. The conferees intend that this provision apply to all aspects of such tests, including procedural safeguards, the use of test results, the rights and remedies provided examinees, and the rights, remedies, and responsibilities of examiners and employers. For example, more stringent bonding requirements in a state law would preempt the federal bonding requirement. State prohibitions on the use of polygraphs in private employment could preempt the limited exemptions provided in this Act. A collective bargaining agreement that provides greater protections to an examinee would take precedence over the correlative provisions in this Act. In addition, since the Act does not apply to state and local governments it would not impede their ability to enforce existing statutes or to enact subsequent legislation restricting the use of lie detectors with respect to public employees.

EFFECTIVE DATE

The House bill provides for an effective date six months from the date of enactment.

The Senate amendment provides for an effective date six months from the date of enactment and provides for all necessary regulations to be issued by the Secretary 120 days from the date of enactment.

The conference agreement provides for an effective date six months from the date of enactment, and for the Secretary to issue necessary rules and regulations no later than 90 days from the date of enactment. The conferees intend that this six-month time period between that date of enactment and the effective date be utilized by the Secretary to develop and promulgate regulations, and for information regarding the requirements of the Act and regulations to be disseminated to affected employees and employers. The conferees do not intend that polygraph examinations be conducted by employers during this time in an effort to administer a greater number of polygraph tests to employees before the effective date of this Act.

MEXICAN STEEL LOAN

The House bill contains no provision regarding the World Bank's proposed loan to the Mexican steel industry.

The Senate amendment includes a sense of the Senate provision that the World Bank should reject a proposed loan to the Mexican steel industry because it would not be in the best interests of the United States.

The conference agreement deletes the sense of the Senate provision. Despite the objections of the Senate, the World Bank approved the loan to the Mexican steel industry on March 3, 1988. Therefore the provision is moot. The deletion of the provision does not reflect any opinion of the conferees regarding this provision.

AUGUSTUS F. HAWKINS,
MATTHEW G. MARTINEZ,

PAT WILLIAMS,
JIM JEFFORDS,
STEVE GUNDERSON,
Managers on the part of the House.

EDWARD M. KENNEDY,
HOWARD M. METZENBAUM,
SPARK MATSUNAGA,
ORRIN HATCH,
ROBERT T. STAFFORD,
Managers on the part of the Senate.

COMMUNICATION FROM CHAIRMAN OF COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION

The SPEAKER pro tempore laid before the House the following communication from the chairman of the Committee on Public Works and Transportation; which was read and, without objection, referred to the Committee on Appropriations:

**COMMITTEE ON PUBLIC WORKS AND TRANSPORTATION,
Washington, DC, May 13, 1988.**

HON. JIM WRIGHT,
*The Speaker, House of Representatives,
Washington, DC.*

DEAR MR. SPEAKER: Pursuant to the provisions of the Public Buildings Act of 1959, as amended, the House Committee on Public Works and Transportation approved the following projects on May 5, 1988:

LEASE PROSPECTUSES

Department of the Interior, Fish and Wildlife Service, Washington, D.C. or Northern Virginia.

Department of Commerce, Census Bureau, Louisville Kentucky/Jeffersonville, IN area.

Department of Commerce, Census Bureau, New York, NY.

U.S. Customs Service, Long Beach, CA.
Corps of Engineers, Internal Revenue Service and National Labor Relations Board, Chicago, IL.

Foley Square (lease-purchase), Manhattan, NY.

CONSTRUCTION

U.S. Courthouse and Federal Building, St. Croix, Virgin Islands.

U.S. Courthouse and Federal Building Annex, Bridgeport, CT.

A.A. Ribicoff Federal Building and Courthouse Annex, Hartford, CT.

U.S. Post Office and Courthouse, Camden, NJ.

U.S. Courthouse and Federal Building Annex, Trenton, NJ.

Federal Building-U.S. Courthouse, Champaign-Urbana, IL.

Border Station, International Falls, MN.

REPAIR AND ALTERATION

Prospectus for Design fiscal year 89.

PCB Program—(Polychlorinated Biphenyl Abatement), Various Buildings.

Automatic Sprinkler Systems, Various Buildings.

Elevators—upgrading.

Federal Building-Post Office-Courthouse, Juneau, AL.

Federal Building, Post Office and Courthouse, Pine Bluff, AR.

Jacob Weinberger Federal Building, San Diego, CA.

Federal Building, Jacksonville, FL.

Gene Snyder Courthouse—Customhouse, Louisville, KY.

Hale Boggs Federal Building—U.S. Courthouse, New Orleans, LA.

John F. Kennedy Federal Building, Boston, MA.

James O. Eastland Post Office—U.S. Courthouse, Jackson, MI.
Federal Records Center, 9700 Page Boulevard, Overland, MO.

Federal Building and U.S. Courthouse, Trenton, NJ.

Emanuel Celler Federal Building and U.S. Courthouse, Brooklyn, NY.

U.S. Mission to the United Nations, New York, NY.

Kenneth B. Keating Federal Building, Rochester, NY.

Clifford Davis Federal Building, Memphis, TN.

U.S. Post Office, Austin, TX.

Bob Casey Federal Building, Houston, TX.
Federal Building-Courthouse, Lubbock, TX.

Post Office-Courthouse, Salt Lake City, UT.

Federal Building, U.S. Post Office and Courthouse, Burlington, VT.

U.S. Courthouse Annex Building, Richmond, VA.

Federal Building-Courthouse, Milwaukee, WI.

Forrestal Building, Washington, DC.

General Accounting Office Headquarters Building, Washington, DC.

General Services Administration, Headquarters Building, Washington, DC.

Ariel Rios Federal Building, Washington, DC.

11 (B) RESOLUTIONS

Boulder, Colorado.

Buffalo, New York.

Cleveland County, NC.

The original and one copy of the authorizing resolution is enclosed.

Sincerely,

GLENN M. ANDERSON,
Chairman.

There was no objection.

PERMISSION FOR MEMBER TO BE COSPONSOR OF H.R. 3807

Mr. KLECZKA. Mr. Speaker, I ask unanimous consent to be made a coauthor of the bill, H.R. 3807.

The SPEAKER pro tempore. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

LEGISLATIVE PROGRAM

(Mr. MICHEL asked and was given permission to address the House for 1 minute.)

Mr. MICHEL. Mr. Speaker, I have asked for this time for the purpose of inquiring of the distinguished majority leader the program for next week after we return from the Memorial Day recess.

Mr. FOLEY. Mr. Speaker, will the distinguished Republican minority leader yield?

Mr. MICHEL. I am happy to yield to the distinguished gentleman from Washington.

Mr. FOLEY. Mr. Speaker, I thank the distinguished Republican leader for yielding.

We have now concluded the business for the day and for the week, and the House will begin this evening the Memorial Day recess.

On Monday, May 30, the House will not be in session. We will not be in ses-

Page Denied